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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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STEPHEN W. JONES et al.,

Plaintiffs and Appellants,

v.

AMC ENTERTAINMENT, INC., et al.,

Defendants and Respondents.

C077507

(Super. Ct.

No. 39201200285233CUPOSTK)

Plaintiffs Stephen and Penny Jones appeal from a summary judgment in favor of defendants AMC Entertainment, Inc. (AMC), and Annette (“Annie”) Huertas (collectively, defendants) in plaintiffs’ premises liability and negligence actions. Plaintiffs’ lawsuit stems from injuries sustained by Stephen while using a men’s restroom at an AMC theater.<sup>1</sup> Plaintiffs argue that the trial court used the wrong standard of proof in granting summary judgment and that they sustained their burden of demonstrating that it was more likely than not that Stephen slipped and fell because of defendants’

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<sup>1</sup> Annie Huertas managed the theater at the time of the incident.

negligence. Defendants contend the trial court properly granted summary judgment because the plaintiffs provided no evidence of negligence liability beyond guess or conjecture.

We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **Undisputed Facts**

Plaintiffs filed a complaint against AMC stating causes of action for premises liability, general negligence, and loss of consortium. The action arose out of injuries Stephen sustained in the men's restroom on a Sunday night at the AMC Theater in Manteca. Stephen left his seat during the movie and went to the restroom. Later, another patron found him unconscious on the floor of the men's restroom with blood coming from his head and alerted staff.

Two AMC employees, Daniel Stanion and Tom Gora, went to the restroom. When they reached Stephen, he was seated in an upright position and conscious. He was disoriented, but with the help of Gora, he stood up, exited the restroom, and sat on a bench outside the restroom. Stanion said there were no fluids other than Stephen's blood on the floor. He said that was "kind of the first thing we looked for, to see how he had fallen." A first responder, Captain David Breitenbucher of the Manteca Fire Department, noticed blood smeared on the wall, but no other substances on the floor. Breitenbucher asked Stephen questions and Stephen had a difficult time answering what his name was or what day it was. Stephen sustained a skull fracture and other injuries. Stephen does not remember what happened.

AMC employees were required to inspect the restrooms at least every thirty minutes and self-report when they did. But there were no sweep sheets or cleaning logs. After Stephen was discovered, Stanion was instructed by Gora to clean up the restroom because the blood was a health hazard. Gora stated that the cleaning was done after the

paramedics arrived, but before the police arrived. The purpose of cleaning was to prevent public exposure to the blood, which Gora considered a biohazard.

According to Stanion, there was a urinal in the restroom which was known to malfunction and overflow occasionally. Because plaintiffs rely so heavily on this testimony on appeal, we set it forth verbatim. During his deposition testimony, Stanion was asked the following questions concerning the urinal and gave the following answers:

“Q. Do you recall within a month either side of this incident, which would have been I guess mid-July through mid-September of 2010, any damage to any of the urinals near where [Stephen] was found?

“A. There was one urinal. It wasn’t damaged, but it perpetually just stopped functioning correctly. That was in that restroom. But there was no like physical damage to it. It was just like a plumbing issue or issue with a – they were the motion sensor ones where you step away and then it would flush. And it was like somebody would step away, and then it would just flush for about two hours. That’s the only thing that I know of.

[¶] . . . [¶]

“Q. Do you recall that urinal overflowing at any point during the period when it was malfunctioning?

“A. That urinal – I mean, it did that from about 2010. It was still doing that when I left in 2012. It did overflow occasionally, but I don’t recall specifically if it overflowed recently in this time period.

“Q. Do you recall in this time period, July or September 2010, that toilet being cordoned off at any point to prevent its use by guests?

“A. It was cordoned off, you know, quite a few times over the years, but it was kind of an often enough thing that I don’t recall specifically, sorry.

“Q. Do you specifically recall whether there were any other fluids on the floor of the restroom on the evening of August 15, 2010, other than [Stephen’s] blood at the time [Stephen] was present in the bathroom?

“A. I do recall because that was kind of the first thing we looked for, to see how he had fallen. And from what we were able to see, there was nothing else on the floor.”

Approximately one month before the incident, AMC decided to stop providing a security guard on Sunday nights at the Manteca theater, but they kept a guard on duty Friday and Saturday nights. At the time of the incident, there was an unalarmed exit door “mere feet” from the restroom. While the exit door was locked from the outside, it was unlocked from the inside allowing someone to enter if the door was left ajar or held open by someone already inside the theater.

There were multiple surveillance cameras in the back corridor, one of which would show the exit door; however, employees do not look at the footage unless there is a reason. Security footage is burned onto a disc and sent to Liberty Mutual Insurance (Liberty) whenever there has been an incident and Liberty requests it. The determination of what footage to burn onto the disc following an incident falls to the theater management. Following Stephen’s injuries, Liberty requested the security footage from the night of the incident. AMC only produced footage from one camera, “Camera-B.” AMC produced twenty minutes of footage, beginning with the moment Stephen entered the restroom’s front entrance and ending with Stephen being wheeled away by first responders.

### **Motion for Summary Judgment**

AMC filed a motion for summary judgment (MSJ) asserting that there is no triable issue of material fact and that plaintiffs’ claim of negligence based on premises liability lacked merit. Defendants argued that plaintiffs could not establish that there was a dangerous condition. Moreover, defendants contended that even if a dangerous condition existed, plaintiffs could not prove that defendants had notice of the dangerous condition.

Plaintiffs opposed the MSJ on the grounds that Stephen was a victim of a mugging in the restroom, arguing that the reason there was no proof of a violent crime was because AMC destroyed the surveillance footage that could have shown if there was an assailant or a dangerous condition. Plaintiffs argued in the alternative that AMC did not maintain and inspect the restroom regularly which left the floor slippery, causing Stephen to slip and fall.

Defendants responded to the opposition arguing that there was no proof of a dangerous condition. Defendants argued that Plaintiffs' argument on "how an assault could have happened is not only unforeseeable it is so convoluted it becomes nonsensical," that a random act of violence caused Stephen's injuries.

During the hearing on the motion for summary judgment, the court noted that no one, including Stephen, knew what caused his injuries. The court asked plaintiffs' counsel to show evidence, other than a guess or conjecture, that there was a dangerous condition that caused Stephen to slip and fall. (*Ibid.*) Plaintiffs' counsel argued that because AMC has a policy to "clean"<sup>2</sup> the restrooms every 30 minutes and because there were no records or logs that showed that employees actually followed the policy, there is an inference that a dangerous condition existed. Plaintiffs' counsel also argued that because there is no surveillance footage showing employees cleaned the restrooms before Stephen's incident, another inference can be made that a dangerous condition existed in the restroom. (*Ibid.*) Plaintiffs' counsel further argued that there could have been urine on the floor that was in the drying process and caused Stephen to fall. (*Ibid.*)

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<sup>2</sup> As we have noted, based on the undisputed facts, the policy was to *inspect* the restrooms every 30 minutes.

The court granted AMC’s motion for summary judgment, reasoning that “it is within the realm of the possibility that someone did attack the plaintiff in the restroom,<sup>[3]</sup> but it is equally within the realm of possibility that the plaintiff may have experienced a transitory dizzy spell and fallen. It is within the parameters that maybe he slipped on something on the floor, but it is not more or less likely that he simply tripped and fell. [¶] To ask a trier of fact to reach a verdict on this evidence to determine which of these scenarios is more likely than not is to ask the jury to guess, and that is not what a trial is for.”

## **DISCUSSION**

### **I. Standards of Review**

“A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law.” (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476 (*Merrill*), citing Code Civ. Proc., § 437c, subd. (c).) “[G]enerally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.) If a defendant shows that one or more elements of a cause of action cannot be established or that there is a complete defense to that cause of action, the burden shifts to the plaintiff to show that a triable issue exists as to one or more material facts. (*Doe v. California Lutheran High School Assn.* (2009) 170 Cal.App.4th 828, 834, citing *Aguilar*, at p. 849.) If the trial court finds that no issue of fact exists, it then has the duty to determine the issue of law. (*California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 22.)

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<sup>3</sup> On appeal, plaintiffs have abandoned their claim that Stephen was assaulted in the restroom.

On appeal, we review the trial court's decision de novo. (*Merrill, supra*, 26 Cal.4th at p. 476.) We independently review the papers supporting and opposing the motion, considering all the evidence offered in connection with the motion and any inferences that the evidence reasonably supports, applying the same rules and standards as the trial court. (*Ibid.*) We view the evidence in the light most favorable to plaintiffs as the losing party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768-769 (*Saelzler*).) In liberally construing the evidence in favor of the party opposing the motion, we resolve all doubts concerning the evidence in favor of the opponent. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.)

## **II. Forfeiture of the Malfunctioning Urinal Theory**

### **A. The Contentions of the Parties**

For the first time, plaintiffs contend on appeal that the malfunctioning urinal was the source of liquid on the floor that caused Stephen's fall. Defendants contend that plaintiffs have forfeited their malfunctioning urinal theory on appeal because they did not raise "the issue" in their opposition to the MSJ at trial. Conversely, plaintiffs contend that "there is a fundamental difference between a 'theory of liability' and evidence that 'supports a theory of liability.'" Plaintiffs point out that they advanced a slip and fall theory of liability all along. They further note that the deposition testimony describing the malfunctioning urinal was included in their opposition to defendants' summary judgment motion. We conclude plaintiffs did not forfeit the argument.

### **B. Analysis**

Defendants rely on *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869. In *Richmond* our high court held that the plaintiffs could not raise a new *legal* theory on appeal that had not been advanced at trial. The plaintiffs had not mentioned the theory in their trial briefs, or in opening and closing arguments. (*Id.* at p. 879.) Here, plaintiffs have not raised a different legal theory; rather they point to facts in their opposition to the

summary judgment motion that purportedly support a triable issue of fact as to their slip-and-fall theory.

Plaintiffs did allege that the floor was slippery, generally. In plaintiffs' opposition to the MSJ, they stated, "Plaintiffs have alleged two possible causes of [Stephen]'s injuries: 1) Defendants failed to maintain and inspect the premises, allowing a hazardous condition (slippery floor) to persist, causing [Stephen] to slip and fall; 2) Defendants failed to take reasonable steps to secure common areas against criminal acts of third parties, allowing a third party to enter the premises and assault [Stephen]." Plaintiffs further raised a slip-and-fall theory as a possible cause of Stephen's injuries, stating in their MSJ opposition: "[T]he forensic evidence and/or the security footage could have determined whether [Stephen] was the victim of an assault and/or a slip." Because we must consider *all* of the evidence offered in connection with an MSJ (*Merrill, supra*, 26 Cal.4th at p. 476) and look at that evidence in the best light for plaintiffs (*Saelzler, supra*, 25 Cal.4th at pp. 768-769), we reject the notion that we should ignore facts included in plaintiffs' opposition to the summary judgment motion in our de novo review. Accordingly, we reject defendants' forfeiture argument. However, as will be seen, our rejection of defendants' forfeiture claim does not mean that plaintiffs should prevail.

### **III. Evidence of Premises Liability**

#### **A. The Parties' Contentions**

Plaintiffs contend that there are triable issues of fact as to how Stephen was injured. Plaintiffs further contend that the trial court employed the wrong standard and that the proper standard is "whether a reasonable view of the evidence (affording Plaintiffs all reasonable inferences) could support a juror's finding that it was 'more likely than not' that [Stephen]'s injuries were caused by a 'slip and fall.' "

Conversely, defendants contend that the trial court used the appropriate standard and that plaintiffs cannot establish a breach of duty with mere conjecture or speculation.

“Where there is evidence that the harm could have occurred even in the absence of the defendant’s negligence, ‘proof of causation cannot be based on mere speculation, conjecture and inferences drawn from other inferences to reach a conclusion unsupported by any real evidence.’ ” (*Padilla v. Rodas* (2008) 160 Cal.App.4th 742, 752 (*Padilla*); see also *Jones v. Hotchkiss* (1956) 147 Cal.App.2d 197, 202 (*Jones*) [reasoning that the plaintiffs must show some evidence of negligence causing a dangerous condition on a slippery floor beyond mere evidence of a fall].) Viewing the evidence in a light most favorable to plaintiffs, we agree with defendants.

### **B. Analysis**

The issue we must determine here is whether, with all the facts and inferences construed in plaintiffs’ favor, the conduct shown by plaintiffs’ evidence could be found to constitute negligence based on premises liability. We conclude that plaintiffs did not present evidence of negligence beyond mere conjecture or speculation.

In *Buehler v. Alpha Beta Co.* (1990) 224 Cal.App.3d 729, 732 (*Buehler*), a case upon which defendants rely, the plaintiff was injured when she slipped and fell in the defendant’s store. The plaintiff did not know what she slipped on, but her theory was that the floor was improperly waxed. (*Ibid.*) There was an eyewitness to the fall who stated that she did not see why the plaintiff fell and, more importantly, she did not think the floor was slippery and did not observe any slippery substances on the floor. (*Ibid.*) The *Buehler* court affirmed the MSJ, concluding that the plaintiff “lost her balance for some unknown reason.” (*Id.* at p. 734.) The court further stated that “ ‘[n]egligence is never presumed’ ” and concluded the facts did not show negligence. (*Ibid.*)

Defendants also rely on *Padilla*, *supra*, 160 Cal.App.4th 742. There, a child drowned in the defendants’ backyard pool when a parent left the child alone for five minutes. (*Id.* at p. 745.) The parents filed an action for negligent supervision and premises liability against the defendants based on the allegedly defective gate. (*Ibid.*)

The trial court granted summary judgment for the defendants. (*Ibid.*) The Court of Appeal affirmed reasoning that even if the gate was defective, the plaintiffs could not establish causation. (*Id.* at p. 752.) The court reasoned, “[t]he probabilities are evenly balanced as to whether [the child] gained entrance to the pool through the side yard gate, the ‘door’ on the other side of the house, or the sliding glass doors of the house.” (*Id.* at pp. 752-753.)

Plaintiffs rely on *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200 (*Ortega*) in contending an inference of negligence could be drawn here from defendants’ failure to regularly inspect the restroom and that defendants had constructive notice of a dangerous condition. In *Ortega*, the plaintiff was a shopper at Kmart who was injured when he slipped on a puddle of milk on the floor. (*Id.* at p. 1204.) The jury found in favor of the plaintiff and Kmart appealed. (*Ibid.*) Our high court held that the plaintiff presented sufficient evidence to show that Kmart’s failure to inspect the premises within a reasonable amount of time was sufficient to allow an inference that the puddle of milk was there long enough for the store to discover and remedy it. (*Id.* at p. 1203.)

Plaintiffs here contend that there is sufficient evidence of negligence based on premises liability and that defendants had constructive notice of a dangerous condition. Their argument is grounded on defendants’ failure to inspect. They point out that AMC had a policy for employees to check the conditions of restrooms every thirty minutes, but there is no proof that employees at the Manteca AMC adhered to the policy. Plaintiffs further allege that there is no surveillance footage showing employees going in to clean the restroom before Stephen’s incident and there are no sweep logs of when employees cleaned the restrooms. Plaintiffs contend that this is sufficient evidence of negligence and notice to withstand summary judgment.

Plaintiffs’ argument is unpersuasive and their reliance on *Ortega* to advance this argument is misplaced. In *Ortega*, the court did not draw inferences that a liquid was on the floor from a failure to inspect. In fact, there was no dispute that milk had spilled onto

the floor and that the plaintiff had slipped in the milk puddle. Rather the failure to inspect went to the question of Kmart's notice of the puddle of milk. (*Ortega, supra*, 26 Cal.4th at pp. 1203-1204.) Unlike in *Ortega*, where there was no dispute about the existence of the puddle of milk, here there is no evidence of any substance on the floor that would have caused Stephen to slip. *Ortega* does not help plaintiffs.

On appeal, plaintiffs place great stock in the evidence that a urinal had malfunctioned and overflowed on occasion. However, there is no evidence showing that the urinal was overflowing on the day Stephen was injured. The only evidence of the malfunctioning urinal came from Stanion. As noted, he was asked during his deposition, "Do you recall that urinal overflowing at any point during the period when it was malfunctioning?" To that question, Stanion replied, "That urinal -- I mean, it did that from about 2010. It was still doing that when I left in 2012. *It did overflow occasionally, but I don't recall specifically if it overflowed recently in this time period.*" (3 AA 504) (Italics added.) Then as part of the same series of questions, Stanion was asked if he had seen any fluids other than Stephen's blood on the floor, and Stanion replied that he specifically recalled there were not. He recalled this because "that was kind of the first thing we looked for, to see how he had fallen."

In our view, the case before us is similar to *Buehler, supra*, 224 Cal.App.3d 729. Here, as in *Buehler*, the plaintiffs were unaware of why they fell and there was no evidence of conduct by the defendants—only factually unsupported theories by the plaintiffs. In *Buehler*, the plaintiff's theory was that the floor was improperly waxed and that caused her to fall. (*Id.* at p. 732.) In the instant case, plaintiffs' theory is that AMC employees did not follow AMC policy and inspect the condition of the restroom at regular intervals, which led to the floor being slippery and Stephen falling. There is nothing beyond conjecture or speculation, just as in *Buehler*, that shows that the floor was slippery or what caused Stephen's fall. Just because the employees may not have checked the restroom does not mean the floor was wet or slippery. While there was

testimony that a urinal in the men's restroom had occasionally overflowed, there is no evidence showing that the urinal was overflowing on the day Stephen fell or around that time period. Stanion stated the urinal "did overflow occasionally, but I don't recall specifically if it overflowed recently in this time period." As noted, he followed that testimony with an explanation that he specifically looked for the cause of Stephen's fall and saw no other fluids on the floor other than Stephen's blood. Stephen could have fallen for any number of reasons. Similar to *Padilla*, at best the probabilities concerning the reasons for Stephen's injuries are evenly balanced.

Plaintiffs also rely on *Jones, supra*, 147 Cal.App.2d 197. In *Jones*, the plaintiff was injured when she slipped and fell on a porch that was waxed and had sawdust on it. (*Id.* at pp. 198-202.) The plaintiff was an invitee and was owed a duty of ordinary care to maintain the floor of the porch in a reasonably safe condition. (*Ibid.*) The trial court granted summary judgment for the defendant. (*Id.* at p. 198.) The Court of Appeal reversed, reasoning that it was for the jury to determine if the condition was one of reasonable safety or if the defendants had exercised ordinary care with respect to the condition of the floor. (*Id.* at p. 204.) The court acknowledged that "[n]o inference of negligence arises from the mere fact of the fall or from the mere fact the floor was slippery in the absence of proof of some foreign substance on the floor or proof of a dangerous condition created by or known to the defendant." (*Id.* at p. 202.) However, the court reasoned that the evidence of sawdust on a waxed floor was sufficient to show a triable issue of fact of a dangerous condition. (*Id.* at pp. 203-204.)

Plaintiffs contend that *Jones* stands for the principle that "[n]egligence may be established by circumstantial evidence . . . [a] plaintiff relying on circumstantial evidence does not have to exclude the possibility of every other reasonable inference possibly deriving from the evidence." (*Jones, supra*, 147 Cal.App.2d at p. 202.) Plaintiffs also contend that the Court of Appeal in *Jones* reversed the trial court's grant of summary judgment because "it failed to apply all reasonable inferences to the evidence. The same

result should occur here.” We disagree. In *Jones*, unlike here, there was evidence of what caused the plaintiff’s fall: sawdust on a waxed floor. (*Id.* at pp. 202-204.) Accordingly, the court reasoned, “The jury could have reasonably inferred from the evidence that the surface of the floor of the service porch was sufficiently hard and smooth to become unsafe with the application of wax, or from the application of wax with sawdust upon it.” (*Id.* at p. 204.)

In this case, the chain of inferences plaintiffs advocate is as follows: Stephen was found on the restroom floor next to a urinal in a restroom where a urinal had occasionally malfunctioned and, therefore, the floor was slippery from an overflowing urinal at the time he fell. Without more evidence indicating that the urinal was overflowing around the time of Stephen’s fall or evidence that the floor was in fact wet or slippery at the time of his fall, this theory is nothing more than speculation. Moreover, as we have noted, Stanion, who was aware of the problem urinal and who specifically looked for the cause of Stephen’s fall, and Breitenbucher, the first emergency responder, stated they saw no substances on the floor other than Stephen’s blood. This negates the already speculative inference that the urinal was malfunctioning on the day of the incident. It also negates the speculative inference that there was urine or another substance on the floor that could have caused Stephen to slip and fall.

Plaintiffs claim the evidence shows that AMC cleaned the restroom before the police arrived so they were unable to determine if there was something other than blood on the floor. But, as we have noted, the evidence shows that first responder Breitenbucher was there before the employees cleaned the floor and he did not observe any substances on the floor.

In our view, based on the evidence that plaintiffs presented, a jury could not make inferences beyond a guess or conjecture that: (1) an occasionally malfunctioning urinal, not shown to have been malfunctioning on the date of the incident, caused Stephen’s slip, fall and injury; (2) there was some other substance on the floor that caused Stephen to

fall; or (3) defendants had constructive notice that there was a dangerous condition in the restroom merely because of the passage of time or because they had no records of when the restroom was inspected on the date of the incident. Accordingly, the trial court properly granted summary judgment.

**DISPOSITION**

The judgment is affirmed. Plaintiffs shall pay defendants' costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (5).)

MURRAY, J.

We concur:

BUTZ, Acting P. J.

DUARTE, J.